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# CHRISTIAN WITNESS, MORAL ANTHROPOLOGY, AND THE DEATH PENALTY

RICHARD W. GARNETT*

> *In this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]*
>
> —William James[1]

> *[W]ithout witness, there is no argument.*
>
> —Stanley Hauerwas[2]

"Are human beings different from meat?" A recent book review opens with the complaint that this is "[a]n example of the worst type of modern philosophical question[;]" a question that, "[f]or those among us who have never been invited into Socratic dialogue by, say, a porterhouse, . . . is dumb in ways rarely thought possible before."[3] The reviewer is right, of course—the question *is* "dumb." Then again, we might wonder if this "worst kind" of question is really all that different from the Psalmist's own: "Lord, what is man . . . that thou thinkest of him?"[4] The question, it turns out, is both perennial and profound—"What is man, and why and how does it matter?"

Now, because my contribution to this volume has been billed as a "theological" reflection on the death penalty, I should

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1. WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY xi (1897) (Dover ed. 1956).

2. STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH'S WITNESS AND NATURAL THEOLOGY 241 (2001).

3. Matthew Rose, *Things Fall Apart*, WKLY. STANDARD, June 17, 2002, at 39 (reviewing JOHN LUKACS, AT THE END OF AN AGE (2002)).

4. *Psalms* 143:3 (Douay-Rheims).

emphasize at the outset that I am not a "theologian," but a Christian layman, lawyer, and law-teacher with, I suppose, some expertise in the areas of criminal justice and "law and religion." That said, my aim in this Essay is to offer an answer—a Christian answer, I hope—to one of the several provocative questions posed by this symposium's hosts: "What role ought religious beliefs play in a pluralistic democratic society that often presumes strict boundaries between matters of private faith and political life?"[5] More particularly, what should Christians *say* who are engaged in dialogue and debate with our fellow citizens in the public square of civil society? In Professor Elshtain's words, "how should we talk?"[6]

Let me start where I want to end: I will argue, *first,* that we should resist, as distorting and dishonest, the imposition of such "strict" boundaries between "matters of private faith and political life;" and, *second,* that in the context of our public arguments about capital punishment, the task for faithful believers is not merely to baptize the policy analyses and preferences of abolitionist or other interest groups, but rather to bear authentic Christian witness to what Pope John Paul II has called the "moral truth about the human person."[7]

## I.

I believe that moral problems—and the death penalty poses, inescapably, such a problem—are *anthropological* problems, because moral arguments are built, for the most part, on *anthropological* presuppositions.[8] In other words, as one scholar put it, our attempts at moral judgment tend to reflect our "foundational assumptions about what it means to be human."[9] And these assumptions matter. If they are untruthful, there is little reason for confidence in the analysis that follows, or for surprise at unsound conclusions. My teacher and colleague Thomas Shaf-

5. A Call for Reckoning: Religion and the Death Penalty, *at* http://pewforum.org/deathpenalty/ (last visited Sept. 22, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

6. Jean Bethke Elshtain, *How Should We Talk?*, 49 CASE W. RES. L. REV. 731 (1999).

7. John Paul II, Ad Limina Address to the Bishops of Texas, Oklahoma and Arkansas, *at* http://www.cin.org/jp2/jp980606.html (June 6, 1998) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

8. Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries,* 14 J.L. & RELIGION 53, 53 (1999–2000).

9. Rev. John J. Coughlin, *Law and Theology: Reflections on What it Means to Be Human from a Franciscan Perspective,* 74 ST. JOHN'S L. REV. 609, 609 (2000) (noting the "perennial nature" of the "anthropological question[:]" "What does it mean to be a human being?").

fer got it right: "Ethics"—or, "thinking about morals"—"is valid only to the extent that it truthfully describes what is going on."[10]

It strikes me that there is a crying need for anthropological truth-telling in the context of what passes today for public moral argument on the death penalty and similarly weighty matters. And my claim here is that religious believers not only may, but must, contribute what Shaffer might call a truthful description of "what is going on" to the public dialogue about capital punishment. We are called today to argue with our fellows about human nature, to provide our political communities what Cardinal Wojtyla of Krakow called a "kind of 'recapitulation' of the inviolable mystery of the person."[11] But not only to argue. I am convinced by Stanley Hauerwas's recently published Gifford Lectures that, in the end, "Christian argument rests on witness."[12] Indeed, "the life of the Christian cannot avoid becoming the life of a witness"[13]—a witness, in this context, to the truth about who we are and why it matters.[14] This might sound, I admit, like theology, not politics, policy, or law. But I understand Hauerwas's point to be that Christian theology, revealed by God and rightly understood, "makes claims on persons' lives[;]" true, it "begins with God," but in so doing, "it tells humans who they are and how they should be."[15] And, I submit, the moral anthropology that attends Christian theology "makes claims" as well on our arguments about capital punishment.

Of course, by framing the death penalty problem in terms of moral anthropology—and "moral anthropology" is used here to mean "an account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated"[16]—I

10. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 965 (1987); *see also* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 264 (1993) ("The norm of Christian social ethics is the obligation to see and speak truthfully.").

11. *See* George Weigel, *John Paul II and the Crisis of Humanism*, *in* THE SECOND ONE THOUSAND YEARS: TEN PEOPLE WHO DEFINED A MILLENNIUM 114, 116 (Richard John Neuhaus ed., 2001) (quoting letter from Cardinal Wojtyla to Henri de Lubac).

12. HAUERWAS, *supra* note 2, at 210.

13. *Id.* at 229.

14. *Id.* at 194.

15. *Id.* at 205.

16. *See, e.g.*, MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 7 (1998) (arguing that because "every human being is sacred," there are "some things that ought never . . . to be done to any human being"). There are, I realize, other ways to use this term. *See, e.g.*, Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1719 (1998) (using "moral anthropology" to

do not mean to deny that the imposition of the death penalty raises a wide variety of challenging, provocative, important, and perhaps more practical questions. For example, does the death penalty deter crime? If so, do the "costs" of capital punishment justify its deterrence "benefits?" How much confidence should we have in the accuracy of the results of capital trials, and how might we increase that confidence? How much appellate and post-conviction review is necessary, appropriate, and feasible in capital cases? To what extent, if at all, should American constitutional and criminal law relating to the death penalty reflect developments in international law, and in the domestic laws of other countries? Are death-eligible defendants provided with adequate legal representation? Do prosecutors and jurors discriminate on the basis of race or sex in the imposition of the death penalty? Does the United States Constitution require that juries, not judges, make the decision for death,[17] or that some convicted murderers—say, those with severe developmental disabilities or teenagers—be exempted categorically from execution?[18] And so on.

Even this quick survey of the debate's landscape confirms that the disputants' attention is focused more on these issues than on abstract questions of moral anthropology. And certainly, these and other constitutional, empirical, administrative, and even fiscal problems deserve and require careful attention, thoughtful consideration, and even our engaged activism. The questions, and their answers, matter. (It would be strange if I thought otherwise, given that I teach courses in criminal law and have a client who, until recently, sat on death row.)

Still, this volume aspires to serve as more than (yet) another policy-oriented "white paper." It purports instead to be the response of a group of faithful believers and engaged citizens to a "Call for Reckoning," a call that presumes and is intended to mine the "resources"—the "unique standpoints and important reflective dimensions"—that "religious voices" can and should provide to neighbors, voters, legislators, and civil society.[19] And

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mean the examination of "[w]hat best explains how human beings developed the disposition to make judgments of moral right and wrong").

17. *See* Ring v. Arizona, 533 U.S. 976 (2002) (Sixth Amendment's jury-trial guarantee requires that juries, not judges, find facts legally necessary for the imposition of a death sentence).

18. *See* Atkins v. Virginia, 122 S. Ct. 2242 (2002) (execution of "mentally retarded" offenders violates the Eighth Amendment's ban on "cruel and unusual" punishments).

19. *See, e.g.*, A Call for Reckoning: Religion and the Death Penalty, *supra* note 5.

so, what is asked of us, and what is needed from us, is not merely a "faith-based" echo of others' proposals and prescriptions, but something distinctive, authentic, unsettling, and even radical.[20] Now, this is not to claim that faithful witness requires imprudence. We have, in any event, no guarantee, of course, that our neighbors and leaders will like what they hear; or that they will listen at all.[21] Still, what our public square needs, and what I believe in the death penalty context is required of us, is a counter-cultural argument—a Story, perhaps[22]—about the dignity and destiny of the human person, "the noblest work of God—infinitely valuable, relentlessly unique, endlessly interesting."[23] I am convinced that we can best help our fellow citizens reach the right conclusion about what to do with convicted murderers not so much by dusting the usual arguments with God-talk as by challenging our culture to understand who and what these condemned persons are, and why it should make a difference.

## II.

I teach, study, and write about crime, punishment, and religious freedom at Notre Dame Law School. Ours is a relatively close-knit community, with a still-real sense of Christian mission. At the heart of that mission is inviting and (we hope) inspiring young lawyers to bring their faith with them to their studies, and then to carry it away with them into their lives in the law. Our view is that we should not expect young lawyers to think well about crime and punishment; about retribution, forgiveness, abuse of power, and the common good; about their clients'

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20. *See, e.g.*, POWELL, *supra* note 10, at 262 n.10 ("Christian theology . . . provides an intellectual and moral basis for a social criticism of American . . . law and politics that is both more radical and more truthful than that based upon secular leftist ideologies.").

21. *See* HAUERWAS, *supra* note 2, at 16.

> I cannot help but appear impolite, since I must maintain that the God who moves the sun and the stars is the same God who was incarnate in Jesus of Nazareth. Given the politics of modernity, the humility required for those who worship the God revealed in the cross and resurrection of Christ cannot help but appear as arrogance.

*Id.*

22. *See* Steven D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487, 498 (2001) (observing that many people believe that "this world and this life are part of an overarching Story" and that this Story is what provides the answer to the Socratic question, "How should I live?"); HAUERWAS, *supra* note 2, at 215 (observing that "Christianity is not a 'position,' just another set of beliefs, but a story").

23. Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 2 (1995) (quoting Chisholm v. Georgia, 2 Dallas 419, 462–63 (1792)).

despair, fear, contrition, and hope; or about corruption, redemption, damnation, and beatitude, if we tell them to wall off their faith from their practices like a conflicted-out law firm partner. We are encouraged to challenge our students with the suggestion that any purported resolution of a legal, moral, or public-policy question whose premise is that lawyers or citizens who are religious believers should hamstring their deliberations by dis-integrating their lives is really no resolution at all.

This volume, then, presents a welcome opportunity to reflect on the challenge that I pose regularly to myself and to my students of integrating our professional, political, intellectual, and religious lives. After all, it is the shared aim of the Pew Forum on Religion and Public Life, and of each of the contributors to this volume, to explore and encourage precisely this kind of integration. This shared aim proceeds, I suspect, from a shared premise; namely, the proposition that the claims, arguments, and expression of religious believers and communities not only have a place and a role in the "public square" of civil society, but are properly directed at its transformation.

We should recall at the outset, though, that this foundational premise cannot—at least, not in the context of contemporary elite opinion—be treated as given, or taken for granted. That religious believers should be speaking at all is, it turns out, hardly less contested than the substance of what we are called to say. After all, John Rawls became "one of the most influential political philosophers of the 20th century"[24] in no small part by making the case that public arguments must sound in "public reason" alone.[25] Religion and religious conviction, on the other hand, "are purely private matters that have no role or place" in the political arena.[26] Richard Rorty, another of our leading public intellectuals, put the matter more bluntly: in his view, what we are about in this volume is not civic-minded, but *gauche*; and it is not public-spirited, but "bad taste to bring religion into discussions of public policy."[27] This is because for Rorty, as Stephen Carter memorably put it, religion is "like building model air-

24. *John Rawls Awarded 1999 National Humanities Medal, at* http://www.hup.harvard.edu/Awards/rawls_nhm.html (last visited Sept. 22, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

25. *See, e.g.*, John Rawls, Political Liberalism 212–54 (1993) (defending an ethos of "public reason" that requires, *inter alia*, that arguments about public policy be couched in terms that are "accessible" to all citizens and that do not presuppose adherence to any religion or other "comprehensive" philosophy).

26. William Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 844 (1993).

27. Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

planes, just another hobby: something quiet, something trivial—not really a fit activity for intelligent . . . adults."[28]

Nor can these be brushed aside as the views of a few ivory-tower luminaries; only a glance through the Letters to the Editor or the Sunday morning talk shows is needed to confirm that such opinions are deeply rooted in both the popular culture and in the commentariat. Alan Wolfe's recent work would seem to confirm that contemporary Americans respect, value, and even cherish religious faith, but only so long as it stays in its place, and remains personal, private, and "non-judgmental."[29] It appears to be broadly—if not deeply—accepted that religious faith really is something that can be privatized, and cordoned off from civic and public life; and also that such a separation is somehow consistent with, if not required by, American constitutional law and the political morality of liberal democracy.

It is against this backdrop that a generation of writers and thinkers—lawyers and legal scholars in particular—has wrestled with the "religion in the public square" question, and with the extent to which the contemporary liberal state, or a modern constitutional democracy, can, may, and should allow religiously-grounded arguments and expression in the public square of civil society. Almost all of the leading lights have weighed in, and the conversation shows few signs of flagging.[30] I could not possibly do justice here either to the richness of the debate itself or to the care with which the participants have honed their arguments.[31]

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28. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 22 (1993).

29. *See* ALAN WOLFE, ONE NATION, AFTER ALL (1998); *see also* Elshtain, *supra* note 6, at 743–44.

> Wolfe's middle-class respondents begin by viewing religion as a private matter to be discussed only reluctantly, a position that already cuts rather dramatically against the American grain. . . . The general view is this: If I am quiet about what I believe and everybody else is quiet about what he or she believes, then nobody interferes with the rights of anybody else.

*Id.*

30. For a small, but still representative, sampling of the legal and political-theory literature, see, for example, Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 217 (2001); Symposium, *Religion in the Public Square*, 42 WM. & MARY L. REV. 647 (2001); RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997); ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 147 (1997); Symposium, *The Role of Religion in Public Debate in Liberal Society*, SAN DIEGO L. REV. 643 (1993); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).

31. *But see* Elshtain, *supra* note 6, at 732–33 ("[A] powerful school, associated with the work of John Rawls . . . , holds that when religious persons enter the public sphere they are obliged to do so in a secular civic idiom, shorn of any

Still, before trying to make the case for a public and distinctively Christian argument about what it means to be human, it makes sense to say a few things in defense of "public and distinctively Christian arguments" generally.

As I see it, there are at least three different strands to the "religion in the public square" debate: The first has to do with constitutional law, the second with the political morality of secular democracies, and the third with faithfulness and theological authenticity. That is, in trying to determine the appropriate role and content of faith-based expression in public life, we might ask not only "what does the First Amendment Religion Clause permit?" and, "in a liberal democracy, committed to equality and characterized by pluralism, how ought citizens to act and argue?" but also, "can religious believers, institutions, and associations keep the faith as they engage the world, and if so, how?" Putting this last question differently, the faithful might wonder how we are to square our (understandable) desire for a voice in the dialogue, and for a "place at the table," with what we might regard as our obligation to speak truthfully and prophetically about God and man—in other words, to "build and set the table itself[?]"[32]

I will start with the third, theological dimension of the debate, because before we tackle the question whether we may respond, in the idiom of faith, to the questions tendered in this symposium while remaining a citizen, we ought to ask—putting aside the Justices and John Rawls—whether and to what extent we may do so while remaining Christians.[33] More particularly, we might ask, *first*, should believers enter the arena at all?; and *second*, if they do, what should they say?

Meaning no disrespect to what my colleague Thomas Shaffer has described as the "Gathered Church" tradition—"[a]n ancient and sometimes inevitable tradition among Jews and Christians teaches believers to get together and then get out of

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explicit reference to religious commitment and belief. I will not rehearse this position yet again. It has been done over and over to the point of near tedium.").

32. HAUERWAS, *supra* note 2, at 238–39 n.77 (citing Michael J. Baxter, C.S.C., *Not Outrageous Enough*, FIRST THINGS 14–16 (May 2001)).

33. *See, e.g.*, Michael J. Perry, *Christians, the Bible, and Same-Sex Unions*, 36 WAKE FOREST L. REV. 449 (2001).

> In deciding whether she should forgo or at least limit reliance on her biblically grounded moral belief, a citizen of a liberal democracy who is a Christian will want to consult the wisdom of her own religious tradition at least as much as she will want to consult either the morality of liberal democracy or . . . the American constitutional morality of religious freedom.

*Id.* at 451.

the way"[34]—my claim is that the answer to the first of these latter two questions is "yes." I believe that religious faith in general—and Christianity in particular—makes claims about the meaning and purpose of life and the universe that push the believer inexorably toward engagement in public life and with "political" matters. As the theologian Johann Metz observed, the "eschatological promises of the scriptural tradition—freedom, peace, justice, reconciliation—cannot be made private. They force one ever anew into social responsibility."[35] To the extent that religion claims to "contain[ ] objectively true insights into human social existence"—and, generally speaking, it does—that "encompassing account of existence necessarily influences the polis."[36] The state should not banish faith to a "nonpublic ghetto," nor should the faithful retreat there.[37] And, in fact, they have not.

Turning back, then, to the debate's first, legal dimension, we are, I suspect, on familiar ground. The First Amendment to our Nation's Constitution promises that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" Few constitutional provisions have a comparable hold on the popular imagination, and fewer still have been so misunderstood and misrepresented.[38] For more than fifty years, judges, scholars, and citizens alike have confused Thomas Jefferson's "figure of speech"[39] about a "wall of separa-

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34. Thomas L. Shaffer, Review Essay, *Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601, 1609 (1994).

> The notion here is that the civil society in which each community of the faithful exists . . . is irrelevant to the communal business of believers. Believers are pilgrims in the world, passers-through, "resident aliens." At best, the civil society is irrelevant. At worst, the civil society is corrupting and destructive, and if the community of the faithful exists for anything it exists to protect itself from secular corruption, so that it can remember what it is, preserve its identity in teaching and in ritual observance, perpetuate itself through educating its children, and wait for the Lord to come back.

*Id.* (quoting STANLEY HAUERWAS & WILLIAM H. WILLIMON, RESIDENT ALIENS: LIFE IN THE CHRISTIAN COLONY (1989)).

35. JOHANNES B. METZ, THEOLOGY OF THE WORLD 153 (Glen-Doepel trans., 1969).

36. Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory*, 30 ST. LOUIS U. L.J. 275, 277, 329 (1986).

37. *Id.* at 280.

38. I will not impose on the reader a catalogue of the flaws and failings of the Supreme Court's Religion Clause jurisprudence. For (just) one powerful critique, see STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995).

39. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.").

tion between church and State" with a rule of constitutional law that would outlaw not only fairly obvious interferences with, and impositions upon, religious freedom, but also obligate the state and its courts to scrub clean the public square of all "sectarian" residue. Dean Kathleen Sullivan, for example, has argued forcefully and prominently that the First Amendment's Establishment Clause was designed not simply to end official sponsorship of churches but also to affirmatively establish a secular "civil order for the resolution of disputes."[40] In other words, she contends, the Constitution is not simply a charter for limited government and ordered liberty, it sets the ground rules for deliberation among citizens about the common good.

Dean Sullivan's view is, I think, mistaken. The First Amendment's "Establishment Clause" is directed at governments only; it neither mandates nor implies a duty of self-censorship by believers; it does not demand a Naked Public Square; and active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state that the Constitution is understood to require. The Constitution imposes no "don't ask, don't tell" rule on religionists presumptuous enough to venture into public life.[41] True, it is not hard to find examples of judicial rhetoric and decisions that provide support for Sullivan's secular-order claims. Our courts and judges have at times seemed more worried about the "divisiveness"[42] and "coercion"[43] thought to attend public manifestations of religious commitment than about the threats posed to authentic religious freedom and pluralism by their own overreactions. As a result, their pronouncements have, on occasion, in Chief Justice Rehnquist's words, seemed to "bristle[ ] with hostility to all things religious in public life."[44]

The trend appears to be away from such ahistorical aversion, though, supplying good reason to believe that courts are abandoning the enterprise of monitoring the religiosity of public discourse. Demands that religious believers either muzzle themselves or retreat from civil society—*i.e.*, that they take their

40. Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

41. Elshtain, *supra* note 6, at 744 ("To tell religious believers to keep quiet, else they interfere with my rights simply by speaking out is an intolerant idea. It is, in effect, to tell folks that they can not really believe what they believe or be who they are: Don't ask. Don't tell.") (emphasis omitted).

42. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

43. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

44. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).

faith and go home—are increasingly rejected. In *Mitchell v. Helms*, for example—a case involving loans of computers and other educational materials to public, private, and religious schools serving low-income students—Justice Clarence Thomas was joined by three of his colleagues in disclaiming a "most bizarre" reading of the First Amendment that would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives."[45] And Justice Antonin Scalia sounded a similar note not long ago, going out of his way in *Good News Club v. Milford Central School* to emphasize that the Establishment Clause imposes no special obligation on devout religious believers to "sterili[ze]" their speech before entering the public forum.[46] In that case, a comfortable majority of the Justices agreed that the Establishment Clause does not require—and, indeed, the First Amendment's free-speech guarantee does not permit—a small-town public school to exclude a Christian student club from otherwise-generally-available public facilities, simply because the club's activities were unabashedly religious.

So, putting aside for present purposes the many difficult questions about what the Constitution allows governments to say and do with respect to religious belief, practice, and institutions; and notwithstanding the widespread misperceptions about the public-square implications of our "separation of church and state;" it should be quite clear that the First Amendment's Religion Clause erects no barrier to—in fact, it protects—the determination of religious believers to respond, in public debate and *as believers*, to the "Call for Reckoning." In Michael Perry's words, political reliance on religiously-grounded morality is both permitted and protected by the Constitution.[47]

But again, there is more—much more—to the problem of religious voices in the public square than constitutional law. One might insist that, whatever the positive law might permit, political morality and the "ethics of citizenship"[48] counsel that religious believers ought still to cabin their commitments, and translate their claims, when they deliberate with their fellows about the common good. One might ask, in other words, whether "political reliance on religiously grounded morality is illegitimate"—even if not unconstitutional—"in a liberal democracy like the

45. 530 U.S. 793, 827–28 (2000) (plurality opinion).

46. 533 U.S. 98, 124 (2001) (Scalia, J., concurring).

47. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001).

48. Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 WAKE FOREST L. REV. 511, 511 (2001).

United States[.]"[49] One might wonder whether, even if expressing, and acting upon, one's faith in public life does not make me an outlaw, does it nonetheless make me a bad citizen, a bad democrat, or a bad liberal?

The answer, according to more than a few of our more prominent theorists, to these questions is "yes." John Rawls, again, has famously contended that the morality of political liberalism requires religious believers, when engaged in public discourse on public matters, to employ a secularized, "accessible" vocabulary, and to proceed in their arguments from similar premises. Stephen Macedo has sounded a similar note, writing that "[t]he liberal claim is that it is wrong to seek to coerce people on grounds that they cannot share without converting to one's faith."[50] Not that we should be surprised by the fact that many of our most gifted thinkers embrace these and similar views; after all, these positions follow from, and cohere nicely with, the "religion as a hobby" mind-set identified by Professor Carter. If religion really is a purely "private" idiosyncrasy, not only in terms of the scope of its influence but also in terms of the matters to which it speaks, then it would be strange, and perhaps not very responsible citizenship, to speak and act as though one's faith had consequences for state and society.

I cannot do much more here than report that these thinkers are mistaken. The political morality of liberal democracy, rightly understood, does not require self-censorship on the part of persons who are believers *and* citizens. Nicholas Wolterstorff put it well:

> [T]he ethic of the citizen in a liberal democracy imposes no restrictions on the reasons people offer in their discussion of political issues in the public square . . . . If the position adopted, and the manner in which it is acted on, are compatible with the concept of liberal democracy, and if the discussion concerning the issue is conducted with civility, then citizens are free to offer and act on whatever reasons they find compelling. I regard it as an important

49. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 221–22 (2001).

50. Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 71 (1998); *see also, e.g.*, Robert Audi, *Religious Values, Political Action, and Civil Discourse*, 75 IND. L.J. 273, 276 (2000) ("[C]itizens in a liberal democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, an adequate secular reason for this advocacy or support . . . .").

> implication of the concept of liberal democracy that citizens should have this freedom—that in this regard they should be allowed to act as they see fit.[51]

In fact, it strikes me as not only unconvincing, but more than a little bit illiberal as well, to posit, as a tenet of political morality and as an obligation attached to democratic citizenship, the peculiar unsuitability for public discourse of one source—*i.e.*, religious faith—of morality, "values," and commitment.[52] To impose such an obligation, and to force religious believers to concede, as the price of admission to the political community, that they "recognize that religious reasons are not good reasons for political action," is, as my colleague Paul Weithman has observed, in effect to deny religious believers "full membership" in that community.[53] As Professor Carter put it, given "[the] ability of [religion] to fire human imagination, . . . [religious people] should not be forced to disguise or remake themselves before they can legitimately be involved in [public debate]."[54] Professor Elshtain agrees: "If we push too far the notion that, in order to be acceptable public fare, all religious claims . . . must be secularized, we wind up depluralizing our policy and endangering our democracy."[55]

## III.

We can say, then, that neither a sound understanding of constitutional law, nor an attractive theory of democratic citizenship, requires the politically-engaged religious believer to cabin,

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51. Nicholas Wolterstorff, *Audi on Religion, Politics, and Liberal Democracy*, *in* RELIGION IN THE PUBLIC SQUARE, *supra* note 30, at 147 (1997).

52. *See, e.g.*, Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639.

> Some views—such as advocacy of slavery or cruelty—may be treated by a liberal society as beyond the pale. But to treat religious views, which have been, and are, entertained by a large majority of the people, including many people of eminent reasonableness and good sense, as within this category, is surely illiberal.

*Id.* at 654 n.56; Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1772–73 (1994) ("Why must we 'bracket' . . . our moral and religious convictions, our conceptions of the good life? Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?") (reviewing RAWLS, *supra* note 25).

53. Weithman, *supra* note 48, at 534.

54. CARTER, *supra* note 28, at 232.

55. Jean Bethke Elshtain, State-Imposed Secularism as a Potential Pitfall of Liberal Democracy (Prague 2000), *at* http://www.becketfund.org/other/Prague2000/ElshtainPaper.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

bracket, translate, or censor herself before entering the fray. So—if Christian believers—*as* Christian believers—do elect to engage the world, though, then what should we say? Having overcome the objections of those who would require, as the price of admission to the public square, that we dis-integrate our religious faith from our commitment to the common good, how should we talk, and to what should we speak?

Professor Elshtain asks whether "the full force of Christian witness [should] be brought to bear on every public policy question," or should instead be "reserved . . . to situations of unusual civic moment and moral challenge[.]"[56] I suspect that the right answer falls somewhere in between these options. In any event, I am confident that the problem of the public authority's response to murderers is one to which we should speak. That said, it does seem wise to warn those who would unleash the "full force of Christian witness" in the death penalty debate that they—that *we*—ought to take care, to make sure that prophesy is not watered down to punditry and that we not become so comfortable on the talk-show circuit that we lose the ability to challenge the world on its Creator's terms.[57] Such caution serves not only the integrity and authenticity of our religious traditions, but also the society and citizens with whom we are engaged in dialogue—even Camus could see that the world needs "Christians who remain Christians."[58] Our calling, again, is not to provide the death penalty debate with a chorus of church-based "me too's;" it is not to christen the bullet-point memos of consultants or even the causes of our political allies; nor is Christianity's task "to underwrite a politics external to itself."[59]

Which brings us back to the question raised at the outset: If, as faithful and engaged citizens, we resolve to answer the "Call for Reckoning" proclaimed in this volume in a way that is true to the traditions out of which we speak, what should our contribution be? Recall my opening assertion that moral problems are *anthropological* problems, in that moral arguments tend to boil down to arguments about "moral truth about the human person."[60] A recent example: Professor Michael Perry argues, in *The*

56. Elshtain, *supra* note 6, at 734 (emphasis omitted).

57. *See* Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089, 1089 (1998) ("Faith must always resist acculturation, or it will have nothing to say to the world or to the culture.") (quoting JOHN F. KAVANAUGH, THE WORD ENCOUNTERED: MEDITATIONS ON THE SUNDAY SCRIPTURES 68 (1996)).

58. ALBERT CAMUS, *The Unbeliever and the Christian*, *in* RESISTANCE, REBELLION, AND DEATH 70 (Justin O'Brien trans., 1961).

59. Elshtain, *supra* note 6, at 736.

60. John Paul II, *supra* note 7.

*Idea of Human Rights*, that "[because] every human being is sacred"—his *anthropological* premise—it follows that there are "some things that ought *never* . . . to be done to any human being"—his moral claim.[61]

Now, I believe that, for the most part, our Nation's moral vocabulary, constitutional law, and political discourse—including its debates about capital punishment—rest upon the unsteady foundation of a flawed moral anthropology. This superficially appealing, but in fact untruthful, unreliable, and ultimately unworthy account of what it means to be human is captured well in the now-infamous "mystery passage" of the joint opinion in *Planned Parenthood v. Casey*, the Supreme Court's 1992 decision that re-affirmed the constitutionally mandated abortion license: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[62] This account of human freedom states an anthropological as well as a legal claim. In fact, what the *Casey* opinion provides is not so much a workable constitutional principle, but a generalized and radical argument about moral self-sufficiency. And while I agree with Professor Elshtain that the anthropology offered in *Casey* is "impoverished," there is no getting around the fact that it is also, as she puts it, "so deeply entrenched that . . . it is simply part of the cultural air we breathe."[63]

My claim is that this "deeply entrenched" *Casey* anthropology serves as the foundation for, and does much of the important work in, our communities' public arguments about moral questions. We—or, at least, many of us—think about the person, and about her rights and duties, and about her very nature, in *Casey*'s terms, and the fact that *Casey*'s anthropology provides the scaffolding for our arguments cannot help but affect the conclusions we reach and solutions we offer. We have, by and large, embraced an account in which the person is and should be regarded as un-tethered, un-situated, and alone. He is "autonomous," not simply in the obvious sense that his choices are not determined or crudely reducible, but in that the only standards against which those choices can be evaluated and judged are those that he generates or endorses. The autonomy of atomized and rootless individuals is not only given, but good in itself—its orientation unjudgeable. Agency is more a raw, pre-moral power than a fragile gift that permits and facilitates the authentic flour-

61. MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 7 (1998).

62. 505 U.S. 833, 851 (1992) (joint opinion).

63. Elshtain, *supra* note 8, at 58.

ishing of the human person. Conduct is good because it is chosen, not chosen because it is good.[64]

"Well," one might ask, "so what?" Why not, both as believers and citizens, embrace and celebrate the autonomy, and thus the dignity and worth, of the un-tethered self? Why not ground our faith-based case for the abolition (or the retention) of the death penalty on the foundation of the *Casey* anthropology? The difficulty, in my view, that the anthropology of the mystery passage is not capable of supporting and sustaining a Christian argument—*i.e.*, the kind of argument that, in this context, Christians should be making—against (or for) the death penalty. This is not to say that *Casey*'s vision does not spin off quite sincere talk about "human dignity"—of course it does. But such talk cannot be sustained by the working anthropological premises.[65] The problem, as Fr. Neuhaus has noted, is "not that it is wrong about the awesome dignity of the individual," but that "it cuts the self off from the source of that dignity."[66] As a result, the "dignity" that emerges from the reining anthropology is more Promethean than Christian. It is posited to consist precisely in our being self-governing choosers. It not only includes, but is utterly reducible to, the capacity to make, and the right to act upon, "autonomous" choices.

"Well then," one might respond, "why not put aside these abstract and probably irrelevant speculations about 'moral anthropology,' and simply join with those partisans in the death penalty debate who base their arguments on human fallibility, discrimination, rehabilitation, or cost?" But I do not think we can, or that Christians should. Our public morality ought to be able to support an argument about why it is that a convicted murderer may not be executed. And it is not enough—though it

64. To be clear, the problem, in my view, with *Casey* is not that it emphasizes and celebrates our capacity to seek, choose, and embrace the good, but that it seems to define the good (for us) solely with reference to the fact of its having been chosen (by us). The opinion's weakness is not that it celebrates human autonomy, or even that it links the dignity of the person with his ability and right to engage in moral decision-making, but rather that it cannot supply any basis for situating and evaluating moral decisions.

65. *See* Wilfred M. McClay, *The Continuing Irony of American History*, FIRST THINGS 20, 25 (Feb. 2002) ("Without a broadly biblical understanding of the sources of the dignity of the human person, it is hard to see how that dignity can continue to have a plausible basis in the years to come."); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 1–5 (2d ed. 1984) (offering the "disquieting suggestion" that "the language and the appearances of morality persist even though the integral substantive of morality has . . . been fragmented, and then in part destroyed").

66. Fr. Richard John Neuhaus, *The Liberalism of John Paul II*, FIRST THINGS 16 (May 1997).

might well be politically effective—for death penalty opponents to argue that "capital punishment does not deter crime" or that "capital punishment costs too much." These are empirical, not religious, arguments, and it strikes me as unwise and unfaithful to pretend otherwise.[67] In any event, death penalty supporters can simply respond by saying that "cost isn't the issue," or perhaps by showing that executions actually do deter some homicides. Nor is it even enough to point out the facts that our system of capital punishment is administered unfairly, and even discriminatorily; that the poor and racial minorities do not receive adequate representation; and that mistakes are inevitable. These observations do little to say why we should not execute a guilty, well represented, white man like Timothy McVeigh.

Here is the challenge, then, for Christian witness: If the "cultural air that we breathe" cannot sustain a moral case against the death penalty, and cannot explain why, in Professor Perry's words, there are "some things that ought never . . . to be done to any human being," then perhaps this failure presents religious believers with the opportunity for truth-telling, with the chance to re-build the debate on sturdier anthropological foundations. We have, remember, an alternative vision to propose, one that turns the received anthropology on its head, one that emphasizes not so much our autonomy and moral self-sufficiency as our dependence and incompletion.[68] After all, that freedom of choice is a gift, and even that its value is "inestimable,"[69] does not make it the only valuable thing; that we are distinguished by our capacity for choice does not mean that our dignity is reducible to that capacity. We are not merely agents who choose, we are people who belong, who exist in, and are shaped by, relationships. We live less in a state of self-sufficiency than in one of "reciprocal indebtedness."[70] That which is our greatest source of pride is, at the same time, a constant call to humility.[71] A Christian anthropology acknowledges our limits. It recognizes—as Professor Gil-

67. *See* HAUERWAS, *supra* note 2, at 20 n.11 (noting the "platitudinous emptiness of liberal Christian moralizing in which the positions of secular liberalism [reappear] in various religious guises").

68. *See, e.g.*, ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999).

69. Faretta v. California, 422 U.S. 806, 833–34 (1975) ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.").

70. Gilbert Meilaender, Review Essay, *Still Waiting for Benedict*, FIRST THINGS 48 (Oct. 1999) (reviewing MACINTYRE, *supra* note 68).

71. *See* JOHN LUKACS, AT THE END OF AN AGE 204 (2002) ("[T]his assertion of our *centrality* . . . is neither arrogant nor stupid. To the contrary: it is anxious and modest.").

bert Meilaender put it recently in a beautiful essay—that we occupy an "in between" place, "between the beasts and God."[72] It grounds our dignity not so much in claims of self-sovereignty as in our status as creatures.[73] That is, it proposes that "the greatness of human beings is founded precisely in their being creatures of a loving God,"[74] and not self-styled authors of their own destiny. Its fundamental proposition is that "the person is a good towards which the only proper and adequate attitude is love" and whose "proper due is to be treated as an object of love."[75] And, finally, it directs our attention to the question that, in the end, must be the focus of our struggles with the difficult issue of capital punishment, namely: "Is the capital sanction 'in conformity with the dignity of the human person[?]'"[76]

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It should be clear that this Essay is offered more as a prolegomena than a resolution. I am not yet sure what all this might mean, or what a shift in our anthropological premises and idiom might yield, in the context of the death penalty debate. I do not yet know how our arguments would change if our understanding of those who have been condemned to die—of their worth, respect-worthiness, and destinies—rested on different anthropological presuppositions. I am sure, though, that it should make a difference; that the debate would *sound* different; and that it would, in Professor Shaffer's words, more "truthfully describe what is going on"[77] if our arguments reflected and explicitly proceeded from a "doctrine of human dignity that turns finally on the client's being a child of God."[78]

Certainly, as a Christian, I am confident that we are not diminished by a faith-inspired shift in focus from autonomy and choice to creaturehood and dependence. As C.S. Lewis once wrote, in his essay, *The Weight of Glory*:

> There are no ordinary people. You have never talked to a mere mortal. Nations, cultures, arts, civilizations—these

72. Gilbert Meilaender, *Between Beasts and God*, FIRST THINGS 23 (Jan. 2002).

73. *See* Coughlin, *supra* note 9, at 619–20.

74. John Paul II, *supra* note 7.

75. Fr. Thomas Williams, L.C., *Capital Punishment and the Just Society*, CATH. DOSSIER, Sept.-Oct., 1998, at 30 (citing KAROL WOJTYLA, LOVE AND RESPONSIBILITY 41–42 (H.T. Willetts trans., 1995)).

76. CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1994).

77. Shaffer, *supra* note 10, at 965.

78. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699 n.7 (1988).

> are mortal, and their life is to ours as the life of a gnat. But it is immortals whom we joke with, work with, marry, snub, and exploit—immortal horrors or everlasting splendours.[79]

Our challenge, then, is to frame the debate so that the death penalty stands or falls not so much on whether or not it is cost-effective, or deters, or is popular, or is imposed without respect to race, sex, or class—though all this certainly matters—but on whether it is consistent with the status, nature, and dignity of the people on whom it is applied. Our challenge is to propose a truthful vision of the human person as "the noblest work of God—infinitely valuable, relentlessly unique, endlessly interesting," and to propose that the question of the death penalty stand or fall on that. Such a vision—"truthful Christian speech"—is required "if we are to be faithful to the God we worship."

79. C.S. LEWIS, THE WEIGHT OF GLORY, AND OTHER ADDRESSES 19 (Walter Hooper ed., rev. & expanded ed. 1980).